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Office of the R.L.A.

As the lands in the village of Malu ( in British India) are situated on a higher level than those of the adjoining village of Bhanderaj (in the Baroda State territory), the storm water from the Malu village lands containing silt and manure flows into the lands of the Bhanderaj village with the result that the lands in the Malu village are left barren and the Malu tank is not filled completely. With a view to prevent the deterioration of the lands it is proposed to stop the water from flowing into the Bhanderaj drain by constructing a bund in the Malu village limits and excavating a channel to divert the water so as to feed the Malu tank (vide plan at p. 95 of loose papers below). As the scheme involved diversion of water, the Baroda State was consulted whether it had any objection to the proposed scheme. The Dewan, Baroda State, contended that lands of Bhanderaj were all 'Kyari' lands and as the monsoon water flowing into or through the village of Malu was useful for cultivation, the Baroda Government would not agree to the diversion of water by constructing a bund and channel in the limits of Malu (vide p. 67 of loose papers. ) In view of this protest, the Collector of Kaira obtained the opinion of the District Government Pleader, Kaira, who opined that: "In this case, rain water from Malu village escapes promiscuously in all directions according to topographical features. In my opinion, owners of lands in Baroda State who receive rain water in their Kyari lands have no vested right in the same. Hence there would be no legal objection to the proposed bund being constructed in spite of the protest of the Baroda State authorities The case is referred to the R. L. A. for confirmation of the view expressed by the District Government Pleader, Kaira.

2. The Baroda Government object to the project because it will deprive the village Bhanderaj in their territory of certain water. It appears that this water is surface water not flowing in a stream. There is nothing to suggest that the Baroda State has a right to this water by grant or agreement. The only other way the right could be acquired would be by prescription under section 15 of the Indian Easements Act of 1882 or by immemorial user. But section 17 of that Act expressly forbids such acquisition by prescription and implicitly forbids it by immemorial user. The relevant portions of Section 17 are as follows:- "Easements acquired under Section 15 are said to be acquired by prescription and are called prescriptive easements.

None of the following rights can be so acquired:-

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(e) a right to surface water not flowing in a stream and not permanently collected in a pool or tank."

The water in this case neither flows in a stream nor is it collected in a pool or tank. Government has power by the customary law in India to regulate in the public interests in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels and of waters introduced into such rivers by means of works constructed at the public expense and in the public interests for purposes of irrigation, provided they do not thereby inflict sensible injury on other riparians owners and diminish the supply they have hitherto utilised (see 32 Mad. 341). It follows as a necessary corollary that Government has by the customary law in India an unqualified right to collect, retain and distribute rain water, not flowing in any defined channel, for the

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purpose of irrigation since it does not involve the riparian rights of any. The village of Bhanderaj clearly has no right to this water and the objection of the Baroda authorities cannot be upheld. The view taken by the District Government Pleader, is correct.

3. In the Collector's letter No. V.U.L. dated the 30th September 1938 it is stated that the proposal is to construct a canal "leading from the present Bhanderaj drainin Baroda territory to the village tank of Malu." It is presumed that by the word 'leading' he merely means that it will begin from near the Bhanderaj drain and not that there will be a take-off from that drain.

Id,/- P.N.M.
2/6
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U.R. to R.D., No. 4543; dated the 2nd June 1942.

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Section 13(a) of the Indian Easements Act, 1882 provides that where a person transfers or bequeaths immoveable property to another if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or the testator, the transferee or the legal representative of the testator shall be entitled to such easement. For claiming a way of necessity it is absolutely necessary that the tenement conveyed is land locked that is surrounded on all sides by land belonging to third persons and the only way of access is over the contiguous land of the grantor. But it is no answer to an argument of absolute necessity that there is some other contiguous tenement over which the owner of the severed part may obtain a right of way (see Amin's Law of Easements, pgs 130). In the present case C.S. No. 1/899 and C.S. No. 899 formed one property prior to 1855-56 and the latter is landlocked that is to say it has no access except through the former and the fact that it can have access through another land is no valid ground for holding that C.S. No. 1/899 is free from the easement. Consequently the occupant of C.S. No. 899 would have been ordinarily entitled to an easement of way over C.S. No. 1/899 but for two circumstances namely: (1) the acquisition of C.S. No. 1/899 under the Foras Act VI of 1851 for road purposes and (2) implied extinction of the easement. Where Government compulsorily acquires land under theprovisions of the Land acquisition Act in virtue of section 16 of the Act. Government takes such land free of all easement rights (Taylor v. Collector of Purnea, 14 Cal. 423). The same is true of a cases where land is acquired under section 1 of the Foras Act VI of 1851. C.S. No. 1/899 on acquisition under section

1 of the Foras Act became free from the easement of access of C.S. No. 899. Further the occupants of C.S.No. 899 have since 1900 been enjoying that right of wayunder a lease which means an express or implied extinction of the easement by release within the meaning of section 38 of the Indian Easements Act. Consequently the present occupant of C.S. No. 899 cannot claim any easement of way over the Government land C.S. No. 1/899. There will be no legal objection to taking action for the removal of the encroachment of C.S. No. 1/899.

Sd./- P.N.M.
20/11/44.
Remembrancer of Legal Affairs.

U.R. to R.D., No. 8150; dated the 21st November 1944.

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L.D.R.I. No. 3547
dt. 18-2-49.

Submitted.

These papers pertain to a representation made by C.T.Lala retired Dy. Collr. to repair the stairs cut into the side slope of the World Hall. The steps of the stairs were cut out in the surface of the side slope of the Hill by the Military authorities when adjacent camp was occupied by them. The camp is at present in charge of the Police Department. It appears from the Executive Engineer's letter at p. 23 ante, that the land through which the footpath linking the steps with the World Down Hill Road passes, has been purchased by the Housing Commissioner from the Municipality for constructing residential quarters. The Executive Engineer Presidency Division fears if the Public is allowed to use the hill top stairs through property owned by Govt. they would establish a right of easement, in due course. The Commissioner of Plice (who is in charge of the camp) states that from the police point of view, there is no objection to allow the public to use the stairs. H.D. also endorses the view taken by the Commissioner of Police and further states that the steps should not be repaired if there is a danger of the public creating a right of easement. Presumably the R.L.A. has been requested to advise whether the public can create a right of easement over lands owned by Government.

There is a danger of creating a customary easement under section 18 of the Indian Easements Act.

U.R. to P.W.D., No. 3989 dt. 25 April 1949 Legal Affairs.

Office of the R.L.A.

Indian Easements Act,
Section 15.

It is not clear on what legal point the R.L.A.'s advice is sought. The suggestion of an agreement with the villagers would be impracticable as it would be difficult to ascertain which villagers are using the pathway and roadway ~~mfm~~ on Railway land and to get an agreement executed by them.

Sd./- P.M.L.
10/2
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U.R. to P.W.D., No. 2072; dated the 11th February 1950.

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Conversion of Katcha Bandharas into Pucca Bandharas.

Rights of the lower riparian owners.

The legal rights of the lower riparian owners is to have the water of the stream transmitted to them continuously and without interruption and without any substantial diminution in volume, their right being only such subject to the qualification that the upper proprietor may, for purposes which the law regards as legitimate, withdraw from the stream, as it passes along his lands, so much of its water as will not materially affect its downward flow, or impair the uses of it. In Debiprasad v. Joynath, 24 I.A. 80-84 Cal. 659. the suit related to the plaintiff's right to dam back a river running through his land so as to divert its water ad libitem for purposes of irrigation and it was held not maintainable without showing that such right was acquired by contract with the lower riparian owners or by prescription (see The Law of Easements by Amin and Shastri, p. 92 and 94).

In Robert Fischer and others vs. the Secretary of State for India in Council (1909 I.L.R. 32 Mad.141) it was held that the Government has power by the customary law in India, to regulate the public interests in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, of water introduced into such rivers by means of works constructed at public expense and in the public interests, for purposes of irrigation, provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilised. It was further held that no action can lie against Government on this account without proof of damage

and that the paramount right of Government is higher than that of riparian owners (see sections 2(a) and section 7, illustration (h) of the Easements Act, 1882). The same principle is recognised in section 31 of the Bombay Irrigation Act, 1879. Thus if the pecca bandharas materially affect the flow and cause sensible injury to the lower riparian owners, they would be entitled to object; and if a law would be made for the purpose, provision for compensation to them would have to be made.

Sd./- P. M. L.
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U.R. to A.& F.D., No. 9885; dated the 5th July 1930.

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